United States of America

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946 7

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~~No. 645~~ //

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FORD MOTOR COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA

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Appeal from the District Court of the United States
for the Northern District of Indiana

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## BRIEF FOR APPELLANT

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# BRIEF FOR APPELLANT

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## I.

## OPINIONS BELOW

No opinion was delivered below. Findings of fact and conclusions of law were made (R. 158-161), but were not reported.

## II.

## JURISDICTION

(a) The statutes believed to sustain appellate jurisdiction are Section 345 of Title 28 and Section 29 of Title 15, United States Code.

(b) Under these statutes, appeal will lie to and only to the Supreme Court because the appeal is from a final order of the District Court in a suit in equity brought in the District Court of the United States for the Northern District of Indiana under Section 1-7, Title 15, United States Code, wherein the United States is complainant.

The order appealed from made some changes and denied other changes in a consent decree. The Supreme Court's exclusive jurisdiction of appeal from such an order is believed to be sustained by *Chrysler Corporation v. United States*, 316 U. S. 556 and *Swift & Company v. United States*, 276 U. S. 311.

(c) Appeal was taken within the time provided in the above statutes. The order appealed from was entered July 25, 1946. Application for appeal was presented September 17 and allowed September 18, 1946.

## III.

## STATEMENT OF THE CASE

### A. The gist of the case.

This appeal concerns the operation of special clauses of an anti-trust consent decree; those clauses were put in to give the defendants relief if certain things happened.

The consent decree, entered November 15, 1938, restrained Ford Motor Company, appellant, from influencing its dealers to give their wholesale and retail financing business to finance companies preferred by Ford (R. 18-41). Among other things, it restrained Ford from owning a finance company—this will be called the bar against affiliation; and restrained Ford from persuading its dealers and the public to use any finance company—these will be called the restraints against persuasion.

On the same day a similar decree was entered restraining Chrysler Corporation. *Chrysler Corporation v. United States*, 316 U. S. 556.

If General Motors Corporation had also consented to such a decree, none of the problems of this appeal would have arisen. But General Motors chose not to do so (R. 174).

When the decrees were entered, General Motors was making 41% of all cars sold while Ford was making 23% and Chrysler 25% (R. 124A).

The government knew that, if General Motors were not restrained like Ford and Chrysler, equality of competitive conditions among them would be disturbed (R. 84, 85).

To prevent this, special relief clauses were put in the Ford and Chrysler decrees so that later on the restraints

against Ford and Chrysler would be lifted if substantially identical restraints had not been imposed on General Motors (R. 84, 85).

In December, 1945, the government moved to have one of these clauses changed so that it would not operate the way it was written (R. 66-72). This clause, as amended by consent, said that the bar against affiliation would end January 1, 1946 if General Motors had not been required meanwhile to dispose of General Motors Acceptance Corporation (GMAC), a finance company wholly owned by General Motors (R. 34, 43, 48, 53, 59, 64). Since General Motors had not been required to do so and could not be required to do so by that time, the government's motion asked to have the date changed to January 1, 1947 (R. 70, 71). Ford filed a response to this motion (R. 74) and moved that an order be entered evidencing the end of this restraint exactly the way the clause was written (R. 76). One part of the order appealed from denied Ford's motion, granted the government's motion, and changed the date to January 1, 1947 (R. 162).

Ford also moved, under another of these clauses, to have the restraints against persuasion lifted, contending that they had not been imposed on General Motors either (R. 76). The other part of the order appealed from denied this motion (R. 161).

Appeal is from both parts of the order.

We will now describe more fully: (B) the restraints imposed on Ford by the consent decree; (C) the steps taken to impose upon General Motors the bar against affiliation, and the relief clause and motions relating to this restraint; (D) the steps taken to impose upon General Motors the restraints against persuasion, the relief clause relating to these restraints, and Ford's motion under this clause; and (E) the findings and conclusions upon which the District Court based each part of its order.

**B. The restraints imposed on Ford by the consent decree.**

There are many restraints; it is convenient to classify them in three groups.

*Group 1—The restraints against financial interest in a finance company.* These restraints—contained in paragraph 12—prevent Ford from:

> accepting a commission from a finance company on account of retail time sales paper acquired by that company from Ford's dealers (R. 34);
>
> making a loan to a finance company (R. 34);
>
> purchasing the securities of a finance company (R. 34); and
>
> paying any money to a finance company to induce it to lower its finance charges unless similar payments are made available to other finance companies (R. 34).

Of these restraints, it is only the restraint against purchase of the securities of a finance company—the so-called bar against affiliation—that is involved here.

*Group 2—The restraints against persuasion.* These restraints—contained in paragraph 6—prevent Ford from:

> recommending, endorsing or advertising a finance company to a dealer or to the public—paragraph 6(k) (R. 30); and
>
> arranging with a finance company for agents of each of them to be present with a dealer for the purpose of influencing him to patronize that finance company—paragraph 6(i) (R. 23).

These are the other restraints that Ford claims should be lifted.

*Group 3—The other restraints.* These restraints—also contained in paragraph 6—prevent Ford from:

> giving one finance company an advantage not accorded others in obtaining the dealers' business—paragraphs 6(a) through 6(e) (R. 20-22);
>
> discriminating or threatening to discriminate between dealers to influence their choice of finance companies —paragraph 6(f) (R. 22);
>
> contracting with the dealer to patronize one finance company—paragraph 6(g) (R. 22-23);
>
> cancelling or threatening to cancel a dealer's franchise because of his failure to patronize some finance company—paragraph 6(h) (R. 23); and
>
> obtaining or using information from a dealer's books to influence his finance company arrangements—paragraph 6(l) (R. 31).

Ford has not raised any question about the restraints in this group. However, one of them, 6(e), which restrains Ford from giving one finance company a privilege not made available to all others, is so broad that it will have to be modified if the restraints against persuasion are to be effectively lifted. This will be explained more fully later.

**C. The steps taken to impose the bar against affiliation upon General Motors, and the relief clause and motions relating to this restraint.**

General Motors has never consented to a decree containing this restraint. It still owns GMAC. However, on October 4, 1940 the government started a civil action against General Motors. The prayer was for a decree requiring General Motors to divest itself of GMAC. When Ford argued its motion and the government's motion in the District Court, this General Motors case had not been reached for trial (R. 158, 175).

The relief clause—in paragraph 12—said that if before January 1, 1941 General Motors were not ordered permanently to divest itself of GMAC, then the bar against affiliation would lapse and Ford would be entitled to an order that it had lapsed (R. 34). The date, January 1, 1941, was changed from year to year by consent (R. 43, 48, 53, 59, 64). The last change by consent was to January 1, 1946 (R. 64).

Since General Motors had not been ordered to get rid of GMAC, Ford asked the court to order that the Ford bar against affiliation had lapsed (R. 76).

The government, however, contending that this relief clause does not mean what it says, asked to have the bar extended to January 1, 1947 without Ford's consent (R. 66). Since the District Court adopted the government's contention, the nature of that contention appears from the findings and conclusions of the court which are summarized later in this statement.

**D. The steps taken to impose upon General Motors the restraints against persuasion, the relief clause relating to these restraints, and Ford's motion under this clause.**

The only action taken to impose these restraints on General Motors was a criminal case. General Motors never consented to a decree and no civil action has been commenced against General Motors seeking to impose these restraints on it (R. 177).

When the Ford decree was entered, General Motors and GMAC had been indicted under the Sherman Anti-Trust Law. That case was tried and resulted in a general verdict of guilty. Judgment was entered November 17, 1939 and appeal taken to the Seventh Circuit Court of Appeals. The conviction was affirmed. *United States v. General Motors Corporation*, 121 Fed. 2nd 376. A petition for certiorari was denied October 13, 1941. 314 U. S. 618. A petition for rehearing was denied November 10, 1941. 314 U. S. 707.

The Ford relief clause—paragraph 12a(3)—said this: if General Motors were convicted the court would suspend each of the restraints in paragraph 6 (these include the restraints against persuasion) to the extent that it was not then imposed on General Motors by the conviction and that the suspension would last until such restraint was imposed in substantially identical terms upon General Motors by consent or litigated decree (R. 36, 37).

Paragraph 12a(2) set out the method of telling how far the conviction imposed each of these restraints on General Motors. It said that the conviction should be deemed a determination of the illegality of any agreement, act or practice of General Motors which was held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty. It then

said that such a determination of illegality should be considered—for the purposes of paragraph 12a(3)—the equivalent of a decree restraining the performance by General Motors of such agreement, act or practice (R. 35, 36).

Under paragraph 12a(3), Ford asked the court to suspend the restraints in paragraphs 6(i) and 6(k)—the so-called restraints against persuasion (R. 76).

Ford also asked the court to suspend the restraints in paragraph 7(d) and, to the extent necessary to make the other suspensions useful, the restraints in paragraph 6(e) (R. 76). Suspension of these paragraphs presents no question: whether or not they are to be suspended depends on what is to be done with 6(i) and 6(k). Paragraph 7(d) is a restraint upon certain finance companies that are also defendants in the Ford case (R. 32). These finance companies are all affiliated with each other, but not with Ford (R. 2). For convenience they will be called "CIT." Although 7(d) is not a restraint upon Ford, paragraph 12a (3)(iii) said that 7(d) should be suspended if 6(i) is suspended (R. 37). The reason for this is obvious: 7(d) is a correlative of 6(i); it enjoins CIT from arranging with Ford for agents of each of them to visit a dealer or prospective dealer together (R. 32). If Ford is free to make such arrangements it should be free to make them with CIT as well as any other finance company, and, if CIT were to continue enjoined, this would not be possible. Paragraph 6(e) restrained Ford from giving any facility, service, or privilege to one finance company without making it available to all finance companies (R. 21, 22). Suspension of 6(i) and 6(k) would be useless, if Ford had to take agents of all finance companies to the dealer or if Ford had to recommend, endorse and advertise all finance companies. So, if 6(i) and 6(k) are to be suspended, 6(e) should also be suspended to the extent necessary to make the other suspensions useful.

Therefore, the only question that really needs arguing in this part of Ford's motion is whether paragraphs 6(i) and 6(k) should be suspended—wholly, partly or not at all. Disposition of the other paragraphs depends on the answer to this question.

Ford contends: that the conviction of General Motors, under the instructions to the jury in that case, did not impose the 6(i) and 6(k) restraints on General Motors to the same extent as in the Ford decree; that the court should suspend these restraints to the extent that the conviction did not impose them on General Motors; and that they should remain suspended until they are imposed on General Motors in substantially identical terms by a later consent or litigated decree.

This is exactly what paragraph 12a(3) says (R. 36). Therefore, the issue on this part of Ford's motion is: to what extent did the judgment of conviction in the General Motors case impose these restraints upon General Motors? Did it impose them at all? If it did, did it impose them to the same extent as in the Ford decree? It not, how far did it impose them?

If it did not impose them at all, 6(i), 6(k) and 7(d) should be completely suspended and 6(e) suspended to the extent necessary to make the other suspensions useful. If the conviction imposed all of these restraints to the same extent as in the Ford decree, then Ford's motion was properly denied. If the conviction imposed some of the restraints and not others or imposed some of them to a lesser extent than the Ford decree, then 6(i), 6(k), 7(d) and 6(e) should be suspended at least to the extent that they were not imposed on General Motors, and possibly to some greater extent, or even completely, if other paragraphs of the Ford decree also contain the portion of these restraints that was imposed on General Motors.

Since the instructions of the trial court in the General Motors criminal case are to be used to determine to what extent these restraints have been imposed on General Motors, a copy of the instructions was attached to Ford's motion for the use of the court (R. 91-117).

**E. The findings and conclusions upon which the District Court based each part of its order.**

1. As to Ford's motion for an order evidencing the lapse of the bar against affiliation and the government's motion for an extension of that bar for another year, the court:

(1) Found (Finding of Fact No. 13) that paragraph 12 of the Ford decree was framed upon the basis that the ultimate rights of the parties thereunder were to be determined by the government's civil anti-trust suit against General Motors Corporation (R. 160) and concluded (Conclusion of Law No. 4) that such was the main purpose and intent of the paragraph (R. 161);

(2) Found (Finding of Fact No. 14) that time was not of the essence with respect to the lapse of the bar against affiliation (R. 160) and concluded (Conclusion of Law No. 4) that the time clause was subsidiary to the main purpose of the paragraph (R. 161);

(3) Concluded (Conclusion of Law No. 5) that the main purpose of the paragraph would be carried out if Ford were given the opportunity at any future time to propose a plan for the acquisition of a finance company and to show that the plan is necessary to prevent Ford from being placed at a competitive disadvantage during the government's civil litigation with General Motors Corporation (R. 161);

(4) Found (Finding of Fact No. 2) that the government has proceeded diligently and expeditiously with its civil litigation against General Motors Corporation (R. 158); and

(5) Found (Finding of Fact No. 15) that Ford had offered no proof that further extension of the bar against affiliation would place it at a competitive disadvantage with General Motors Corporation and (Finding of Fact No. 16) that the further extension of the bar to January 1, 1947 would not place it at such competitive disadvantage (R. 160).

On the basis of these findings and conclusions, the court granted the government's motion for extension of the bar against affiliation, extending it to January 1, 1947, and denied Ford's motion for an order that the bar had lapsed (R. 162).

2. As to Ford's motion under paragraph 12a, the court found:

(1) That the trial court in its instructions to the jury in the General Motors criminal case had held that each act restrained by paragraphs 6(i) and 6(k) of the Ford decree, among others, constituted a proper basis for the return of a general verdict of guilty (Finding of Fact No. 7) (R. 159);

(2) That the general verdict of guilty against General Motors was the equivalent of a decree restraining the performance by General Motors of the acts restrained by those paragraphs (Finding of Fact No. 8) (R. 159);

(3) That, therefore, the restraints imposed on Ford by those paragraphs had been imposed in substantially identical terms upon General Motors (Finding of Fact No. 9) (R. 159); and

(4) That Ford Motor Company was not laboring under any competitive disadvantage with General Motors Corporation in the manufacture and sale of Ford cars by virtue of the restraints contained in paragraphs 6(i) and 6(k) of the Ford decree and offered no evidence showing competitive disadvantage (Finding of Fact No. 10) (R. 159).

On the basis of these findings, the court denied this part of Ford's motion (R. 161).

**F. Conclusion of Statement.**

The court's order was entered July 25, 1946 (R. 157). The present appeal was then taken. Probable jurisdiction was noted on November 12, 1946 (R. 222).

## IV.

## ASSIGNMENTS OF ERROR

Appellant specifies the following errors as those which are intended to be urged:

**A. As to its motion under paragraph 12a:**

1. The court erred in finding (Finding of Fact No. 7) that the trial court in its instructions to the jury in the criminal anti-trust proceedings against General Motors Corporation, *et al.*, held that the agreements, acts and practices enjoined in paragraphs 6(i) and 7(d) of the decree in this cause (*i.e.*, the arrangement by respondent with any finance company, or by any respondent finance company with this respondent, for a visit to a dealer or prospective dealer for the purpose of influencing him to patronize such finance company) constituted a proper basis

for the return of a general verdict of guilty in those proceedings, as such finding was not supported by the evidence, and, because of such error, also erred in finding (Finding of Fact No. 8) that such general verdict of guilty was the equivalent of a decree restraining the performance by General Motors Corporation and General Motors Acceptance Corporation of such agreements, acts and practices, and in finding (Finding of Fact No. 9) that the prohibitions imposed on this respondent by said paragraphs 6(i) and 7(d) had been imposed in substantially identical terms upon General Motors Corporation and General Motors Acceptance Corporation as a result of such general verdict, and in denying this respondent's motion for a suspension of the restraints contained in said paragraphs and for a suspension of such portion of paragraph 6(e) of the decree as restrains the performance by this respondent of the acts, practices and agreements also restrained by said paragraphs 6(i) and 7(d).

2. The court erred in finding (Finding of Fact No. 7) that the trial court in its instructions to the jury in the criminal anti-trust proceeding against General Motors Corporation, *et al.*, held that the agreements, acts and practices enjoined in paragraph 6(k) of the decree in this cause (*i.e.* the recommending, endorsing and advertising of any finance company to respondent's dealers or to the public) constituted a proper basis for the return of a general verdict of guilty in those proceedings, as such finding was not supported by the evidence, and, because of such error, also erred in finding (Finding of Fact No. 8) that such general verdict of guilty was the equivalent of a decree restraining the performance by General Motors Corporation of such agreements, acts and practices, and in finding (Finding of Fact No. 9) that the prohibitions imposed on this respondent by paragraph 6(k) had been imposed in

substantially identical terms upon General Motors Corporation as a result of such general verdict, and in denying this respondent's motion for a suspension of the restraints contained in such paragraph and for a suspension of such portion of paragraph 6(e) of the decree as restrains the performance by this respondent of the acts, practices and agreements restrained by said paragraph 6(k).

3. The court erred in finding (Finding of Fact No. 10) that this respondent is not laboring under any competitive disadvantage with General Motors Corporation in the manufacture, sale and financing of Ford cars by virtue of the prohibitions contained in paragraphs 6(i), 6(k) and 7(d) of the decree herein, and offered no evidence showing competitive disadvantage, as such finding was not supported by the evidence.

**B. As to Ford's and the government's motions under paragraph 12:**

4. The court erred in amending paragraph 12 of the decree in this cause by substituting the date January 1, 1947 therein in lieu of the date January 1, 1946 and in denying the motion of this respondent for the entry of an order to the effect that nothing in said decree shall preclude this respondent from acquiring and retaining ownership of and/or control over or interest in any finance company or from dealing with such finance company and with the dealers in the manner provided in said decree or in any order of modification or suspension thereof entered pursuant to paragraph 12a thereof.

5. The court erred in finding (Finding of Fact No 13) that the provisions of paragraph 12 of the decree, relating to the bar against affiliation, were framed upon the basis

that the ultimate rights of the parties thereunder should be determined by the government's civil anti-trust suit against General Motors Corporation and General Motors Acceptance Corporation, as such finding was not supported by the evidence.

6. The court erred in finding (Finding of Fact No. 14) that time was not of the essence with respect to lapse of the bar against affiliation as such finding was not supported by the evidence.

7. The court erred in concluding (Conclusion of Law No. 4) that the purpose and intent of paragraph 12 was to provide that the test of the permanency of the bar against affiliation was to abide the outcome of the civil anti-trust suit against General Motors Corporation, and that the time clause was subsidiary to such main purpose.

8. The court erred in finding (Finding of Fact No. 2) that the government has proceeded diligently and expeditiously in its said civil anti-trust suit against General Motors Corporation, as such finding is not supported by the evidence.

9. The court erred in finding (Findings of Fact Nos. 15 and 16) that this respondent offered no proof that further extension of the bar against affiliation will place it at a competitive disadvantage with General Motors Corporation and that further extension of the bar against affiliation until January 1, 1947 will not impose a serious burden upon this respondent and will not place this respondent at a competitive disadvantage as regards General Motors Corporation, as these findings are not supported by the evidence.

10. The court erred in concluding (Conclusion of Law No. 5) that the purpose and intent of the decree will be carried out if this respondent is given the opportunity at

any future time to propose a plan for the acquisition of a finance company and to make a showing that such plan is necessary to prevent this respondent from being placed at a competitive disadvantage during the pendency of the government's civil litigation against General Motors Corporation, *et al.*

## V.

## SUMMARY OF ARGUMENT

The argument will be divided into two parts: Part A, relating to the restraints against persuasion, and Part B, relating to the bar against affiliation.

### Part A—The Restraints Against Persuasion

I. The gist of the government's criminal case against General Motors, according to the instructions to the jury, was that General Motors, in concert with GMAC, had unduly restrained trade in its own products by acts and practices that compelled its dealers to use GMAC.

II. Under paragraph 12a of the Ford decree, if some acts or practices of General Motors were not held by the trial court, in its instructions to the jury in the General Motors criminal case, to constitute a proper basis for the return by the jury of a general verdict of guilty, and if some restraints in paragraph 6 of the Ford decree prevented Ford from performing those acts or practices, then those restraints were to be suspended to such an extent that Ford could perform those acts or practices without being held in contempt.

III. In its instructions to the jury in the General Motors criminal case, the trial court expressly held that it was proper for General Motors to recommend GMAC to its dealers, to expound the advantages of GMAC to its

dealers, to persuade its dealers to use GMAC and to argue with them that they should use GMAC. These acts and practices were not held to constitute a proper basis for the return of a general verdict of guilty.

IV. It is therefore clear that paragraph 6(k) of the Ford decree goes too far. By restraining all recommending, endorsing and advertising, that paragraph restrains some acts and practices that were not held by the trial court in the General Motors case to constitute a proper basis for the return of a general verdict of guilty.

V. The trial court in its instructions to the jury held that the only acts or practices that constituted a proper basis for a verdict of guilty were those that involved the use by General Motors of something within its power, such as the ability to cancel a dealer's franchise or to fail to renew such a franchise or to discriminate between dealers in the shipment of automobiles, as a club to force its dealers to use GMAC.

VI. All the acts that were held by the trial court to involve the use of force and therefore to constitute a proper basis for the return of a general verdict of guilty are restrained in paragraphs of the Ford decree that are not questioned here.

VII. Complete suspension of paragraph 6(k) will not permit Ford to go beyond persuasion. If Ford went beyond persuasion, it would violate paragraphs of the decree not questioned here. Therefore, paragraph 6(k) should be completely suspended.

VIII. The trial court did not hold that the conduct restrained by paragraph 6(i) involved the use of force and constituted a proper basis for the return of a verdict of guilty. It made no mention of such conduct.

IX. Since the General Motors trial court did not instruct the jury as a matter of law that the conduct restrained by 6(i) was improper, the lower court in this case was not justified in refusing to suspend 6(i) in the belief that the conduct restrained by that paragraph was coercive as a matter of fact. 6(i) should be suspended.

X. The difficulties of proof that might be imposed on the government by suspension of 6(i) and 6(k) do not justify denial of the suspension.

XI. The government itself has said that there is nothing illegal about advertising a finance company and that this restraint has not been imposed on General Motors.

XII. The finding of the District Court (Finding of Fact No. 10) (R. 159) that Ford was not laboring under any competitive disadvantages with General Motors in the manufacture and sale of Ford cars by virtue of the restraints contained in paragraphs 6(i) and 6(k) of the decree and that Ford offered no evidence showing competitive disadvantage is immaterial, even if it be true (which is denied).

XIII. The finding of the lower court that Ford was not under any competitive disadvantage with General Motors and had not made any showing of competitive disadvantage was wrong.

### Part B—The Bar Against Affiliation

I. The relief clause in paragraph 12 should be enforced the way it was written even if the government has been diligent in requiring General Motors to part with GMAC and even if Ford had not shown any actual competitive disadvantage as against General Motors.

II. *Chrysler Corporation v. United States,* 316 U. S. 556, is distinguishable on the ground that the complete abandonment of automobile production during the war produced a situation not within the contemplation of the parties at the time of the consent decree and justified the further extension of the bar against affiliation in that case.

III. The government has not been diligent in requiring General Motors to part with GMAC and did not establish diligence in the court below.

IV. Ford is under a competitive disadvantage with General Motors as a result of the bar against affiliation and established this fact in the court below.

## VI.

## ARGUMENT

### PART A—THE RESTRAINTS AGAINST PERSUASION

**I. The gist of the government's criminal case against General Motors, according to the instructions to the jury, was that General Motors, in concert with GMAC, had unduly restrained trade in its own products by acts and practices that compelled its dealers to use GMAC.**

The instructions are in two parts: the original instructions delivered before the jury retired (R. 91-107); and the supplemental instructions delivered later in answer to questions asked by the jury (R. 108-117).

Some sections of both parts have no bearing on this case, such as the court's comments on jury duty, its summary of the Sherman Law, its description of the defendants, its comments on the credibility of witnesses, the doctrine of reasonable doubt, and similar matters.

The sections of the original instructions that are important here are those dealing with the indictment and the evidence: beginning "So this indictment was brought" (R. 93) and ending "Those are the issues" (R. 101).

The important section of the supplemental instructions begins "Now, these paragraphs in the indictment" (R. 110) and ends "whether it is an unreasonable restraint" (R. 113).

Only excerpts from these instructions will be quoted here. Although the use of excerpts exposes one to the charge of distorting the original, this is the only means available for appellant to indicate what it believes these instructions mean. The instructions were delivered ex-

temporaneously from a few notes (R. 111) and they possess the infirmities often found in such a document. The instructions for this reason are not completely self-explanatory. Appellant believes that its interpretation of the instructions as shown by these excerpts is a fair one when the instructions are viewed as a whole and that its use of excerpts does not result in any distortion. The instructions must be read through to determine whether the interpretation is fair.

The gist of the government's case is stated in many places in the instructions. Only a few of them will be quoted:

> • • • "The indictment charges they have conspired in pursuance of this conspiracy to restrict or restrain unduly and unreasonably interstate commerce in these cars; they have used these means, or done these acts to force General Motors dealers to use General Motors Acceptance Corporation for financing purposes and sales of automobiles, and not to use outside finance companies" • • • (R. 94).

> The government "can only complain if the defendants do sufficient of these acts charged in the indictment as constitute duress upon the dealer to accomplish a result that would have otherwise not have been accomplished, and to make a dealer do something that he would not have done of his own free will. That, almost, is the question in this case—whether the dealer could act as a free man; whether he could act of his own free will" (R. 99).

> "The government's case under this indictment is grounded upon this setup, if I may use that word: That these defendant corporations and these individual defendants who are officers, agents and representatives of the corporations, have by concerted action, knowingly participated in and done such things as create coercion upon the dealers to bring about a certain result, the use of GMAC" (R. 112).

> "The ultimate question, after all, is whether, under all the facts and circumstances, the acts of coercion mentioned in the indictment and set up in the indictment have been proved beyond all reasonable doubt. Second, if they have been so proven, whether they have resulted to effectuate an unreasonable restraint of interstate commerce in automobiles. If it effectuated a restraint, then you have got to determine from all the facts and circumstances whether it is an unreasonable restraint" (R. 113).

This part of Ford's appeal, therefore, hinges on what the trial court meant when it referred to: "means" or "acts to force General Motors dealers to use General Motors Acceptance Corporation"; "acts charged in the indictment as constitute duress upon the dealer to accomplish a result that would have otherwise not have been accomplished"; "such things as create coercion upon the dealer to bring about a certain result, the use of GMAC."

Did it mean to include all acts and practices by which General Motors made it known to its dealers that it preferred to have them patronize GMAC? If it did, then obviously all conduct of the type restrained by paragraphs 6(i) and 6(k) of the Ford decree was held to constitute a proper basis for the return of a general verdict of guilty against General Motors; General Motors was to be deemed restrained from engaging in such conduct; and paragraphs 6(i) and 6(k) should not be suspended at all. However, if the trial court did not mean to include all such acts and practices, then the conviction was not a determination of the illegality of all such acts and practices; General Motors was not to be deemed restrained from performing some of these acts and practices; and paragraphs 6(i) and 6(k) should be suspended at least in part. This follows from the provisions of paragraph 12a of the Ford decree.

**II. Under paragraph 12a of the Ford decree, if some acts or practices of General Motors were not held by the trial court, in its instructions to the jury in the General Motors criminal case, to constitute a proper basis for the return by the jury of a general verdict of guilty, and if some restraints in paragraph 6 of the Ford decree prevented Ford from performing those acts or practices, then those restraints were to be suspended to such an extent that Ford could perform those acts or practices without being held in contempt.**

Paragraph 12a(1) of the Ford decree said that if the General Motors criminal case did not result in a conviction the whole decree would be suspended until substantially identical restraints were imposed on General Motors by consent or litigated decree. Since the General Motors criminal case did result in a conviction, 12a(1) does not apply.

The fact that an acquittal of General Motors was to relieve Ford of the entire decree did not, however, mean that the entire decree was to remain in effect if General Motors were convicted; paragraphs 12a(2) and 12a(3) said that parts of paragraphs 6 and 7 might be suspended even if General Motors were convicted.

12a(3) said that each restraint in paragraph 6 was to be suspended to the extent that it had not been imposed upon General Motors by the equivalent of a decree as defined in 12a(2). 12a(2) said: the conviction was to be a determination of the illegality of each agreement, act or practice that the trial court, in its instructions to the jury, held to constitute a proper basis for the return of a general verdict of guilty; and such determination was to be deemed the equivalent of a decree restraining the performance of such agreement, act or practice.

This meant that, if some act or practice of General Motors were not held by the trial court to constitute a proper basis for a verdict of guilty, there would be no determination of the illegality of that act or practice and General Motors would not be deemed to be restrained from performing it. Under 12a(2) this result would follow whether the trial court failed to hold that the act did constitute a proper basis for such a verdict or affirmatively held that the act did not constitute such a basis.

It follows from paragraph 12a(3) that if some restraints in paragraph 6 of the Ford decree prevented Ford from performing such an act or practice, then those restraints were to be suspended to such an extent that Ford could peform that act or practice without being held in contempt.

**III. In its instructions to the jury in the General Motors criminal case, the trial court expressly held that it was proper for General Motors to recommend GMAC to its dealers, to expound the advantages of GMAC to its dealers, to persuade its dealers to use GMAC and to argue with them that they should use GMAC. These acts and practices were not held to constitute a proper basis for the return of a general verdict of guilty.**

The trial court said:

> General Motors has "a perfect right to have a finance company and to recommend its use" (R. 98).
>
> • • • "It is not charged here that to recommend the use of GMAC there is anything wrong;" • • • (R. 99).
>
> "You know, you have heard of the terms: Exposition; Persuasion; Argument; Coercion. They are different steps. They are graduated steps that I

suppose every salesman goes through, except perhaps the last. In Exposition one may expound the merits of that which he has to sell; he may explain its nature and by its exposition make a clear picture of what he has. By persuasion he may endeavor to persuade the person to whom he is talking to accept that which he has to offer. There is little advancement in his further progress to argue. Persuasion means something softer than argument, perhaps, but he may argue with him, and argue with him the respective merits of his product and other products being offered to the person to whom he makes his offer. All of these are proper" (R. 100).

"I think I said to you yesterday that the defendants may expound the alleged advantages of GMAC; they may explain fully the characteristics of its operations, as they claim they exist; they may point out the advantages; they may expound all of those things; they may persuade; they may use persuasion in their conversations, in their communications with their dealers; they may even argue. Those things are all proper" (R. 112).

**IV. It is therefore clear that paragraph 6(k) of the Ford decree goes too far. By restraining all recommending, endorsing and advertising, that paragraph restrains some acts and practices that were not held by the trial court in the General Motors case to constitute a proper basis for the return of a general verdict of guilty.**

By restraining Ford from recommending, endorsing nd advertising a finance company to its dealers, 6(k) also estrains Ford from using exposition, persuasion and rgument with its dealers. If all that General Motors ad done was to recommend GMAC, expound the adantages of GMAC, persuade its dealers to use GMAC nd argue with its dealers that they should use GMAC, is difficult to see how the jury in the General Motors

case could have properly returned a verdict of guilty against General Motors.

Ford on the other hand could be held in contempt for merely recommending a finance company to its dealers.

If the instructions of the trial court meant what they said, then paragraph 6(k) should be suspended at least to the extent that it restrains recommendation, exposition, persuasion and argument as such.

Our position here is similar to the position taken by Mr. Justice Frankfurter in his dissenting opinion in *Chrysler Corporation v. United States*, 316 U. S. 556, 568. Apparently referring to the statement of the trial court in the General Motors case that General Motors has "a perfect right to have a finance company and to recommend its use" (R. 98), Mr. Justice Frankfurter said:

> "Since the trial judge did not instruct the jury that affiliation as such was unlawful, and indeed the contrary, the criminal proceeding could no longer be claimed to control the validity of the affiliation prohibited by paragraph 12 of the Chrysler decree."

It is our position that since the trial judge did not instruct the jury that recommendation as such was unlawful, and indeed the contrary, the criminal proceeding could no longer be claimed to control the validity of recommendation.

Therefore, it is clear that something must be done to 6(k). Under the instructions of the trial court in the General Motors case Ford is entitled at the least to go as far as bare advertising, recommendation, persuasion and argument but 6(k) restrains it from doing any of these.

The next question is: Does 6(k) go out entirely or is it merely to be modified in some manner? We attack this

question in three stages: first, we will examine the trial court's instructions further, this time with the emphasis not on what the trial court held was legal but on what were the particular practices which were held illegal; secondly, we will look at the other sections of the decree and see if those other sections restrain Ford from doing what the trial court held was illegal; thirdly, we will show that none of 6(k) needs to be saved and that it should be suspended entirely because all the practices which the trial court held were illegal are covered in other sections of the decree.

The next three sections of this brief cover these three steps.

**V. The trial court in its instructions to the jury held that the only acts or practices that constituted a proper basis for a verdict of guilty were those that involved the use by General Motors of something within its power, such as the ability to cancel a dealer's franchise or to fail to renew such a franchise or to discriminate between dealers in the shipment of automobiles, as a club to force its dealers to use GMAC.**

The trial court made this clear in many portions of its instructions:

> • • • "but the Government's theory in this case is irrespective of these contracts and independent of them and outside of them the conditions have been asserted that they, under the designation of those to the grand jurors unknown, the actions have been such that the possibility, the ability to cancel, the ability to refuse to renew a contract, have been used as clubs upon the dealers to force them to use GMAC and that these acts that are complained of were acts that were used to force the dealers to use GMAC, the Government insists that these acts in-

spired by that motive have been such as to result in cancellations that otherwise would not have occurred; in discriminations that would not otherwise have occurred in the shipment of cars in interstate commerce and in refusals to renew that would not otherwise have occurred, and in the use of GMAC when it otherwise would not have been used" (R. 99).

After discussing exposition, persuasion and argument in the language quoted in paragraph III of this argument, the trial court said:

> "He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer" (R. 100).
>
> "Against that the Defendants have offered their testimony that they never have used duress, that they never have insisted, have never used this right of cancellation, this one-year contract, the right to renew it or not to renew it or used the other things as clubs. The easiest way I know to express it to you is that they never used it to force dealers to use GMAC." (R. 101).
>
> "But the charge in this indictment is that they utilized a contract which was limited to one year and might or might not be renewed and a cancellation clause in that contract upon short notice and discrimination in the shipment or non-shipment of automobiles, used them as a club upon their dealers, and thereby coerced them to use something which they, as free agents, would not have used. That is the groundwork upon which this charge is brought, and whether they did that or not is a question of fact which you alone can decide, and Government says, and the charge in this indictment is, that this coercion, this misuse, that has proceeded, according to the indictment, beyond exposition, persuasion and argument, has resulted in a situation where the

commerce in General Motors cars, the products of General Motors, from state to state, has been unreasonably and unduly restricted and restrained" (R. 113).

**VI. All the acts that were held by the trial court to involve the use of force and therefore to constitute a proper basis for the return of a general verdict of guilty are restrained in paragraphs of the Ford decree that are not questioned here.**

It is clear from the above quoted portions of the instructions that cancellation of a dealer's franchise or refusal to renew a dealer's franchise or discriminations between dealers in the shipment of automobiles or threats of these actions, when done because the dealer had not patronized GMAC or when done to induce the dealer to patronize GMAC were held to involve the use of force and therefore to constitute a proper basis for the return of a general verdict of guilty.

These acts and practices, however, are all restrained by paragraphs of the Ford decree which are not questioned here. Paragraph 6(h) of the Ford decree restrains Ford from cancelling or terminating any contract, franchise or agreement with any dealer and from threatening to do so, because of the failure of such dealer to patronize a preferred finance company. Ford, therefore, could not cancel a dealership or refuse to renew a dealer's franchise without violating the decree. Paragraph 6(f) of the decree restrains Ford from giving or making available or denying or threatening to deny to any dealer any service or facility or from discriminating among its dealers in any other manner, for the purpose of influencing a dealer to patronize a preferred finance company. Therefore, Ford could not discriminate between its dealers in the shipment of cars or in any other manner or even threaten to do so

for the purpose of inducing a dealer to patronize a preferred finance company without violating its decree.

But the government will argue that these were not the only acts that were held by the trial court to involve force and therefore to constitute a proper basis for the return of a general verdict of guilty. Possibly the trial court in its instructions to the jury did not limit its definition of force to these acts. The trial court said:

> The government "can only complain if the defendants do sufficient of these acts *charged in the indictment* as consttiute duress upon the dealer to accomplish a result that would have otherwise not have been accomplished, and to make a dealer do something that he would not have done of his own free will" (R. 99).
>
> "Against that the defendants have offered their testimony that they never have used duress, that they never have insisted, and never used this right of cancellation, this one year contract, the right to renew it or not to renew it or used *the other things* as clubs" (R. 101).
>
> "If the government has proved the acts beyond all reasonable doubt *that are averred in this indictment,* you have a right to find these defendants guilty" (R. 101).

(The emphasis is supplied.) Perhaps other portions of the instructions may be found where the trial court referred in general terms to the acts charged in the indictment.

However, with the exception of recommendation, endorsement and advertisement, every act charged in the General Motors indictment is restrained by paragraphs of the Ford decree which are not in question here. The trial court summarized the indictment for the benefit of the jury (R. 94-96). We will quote each section of this summary

and at the end of it indicate the paragraph of the Ford decree that restrains the acts referred to:

> The defendants "have used these means, or done these acts to force General Motors dealers to use General Motors Acceptance Corporation for financing purposes and sales of automobiles, and not to use outside finance companies by requiring them to agree to do so as a condition to entering into contracts with them" (restrained by paragraph 6(g) of the Ford decree), "making such contracts for one year only with the right to cancel without cause, in order to exercise it for that purpose, authorizing a cancellation of contracts, and cancelling contracts" (all restrained by paragraph 6(h) of the Ford decree), "and further by refusing and failing to furnish and in holding up the transportation, shipment, delivery of automobiles to dealers" (restrained by paragraph 6(f) of the Ford decree) "and further by examining dealers' records concerning financing and in coercing dealers, to permit such examination and to disclose such information, procuring same from employees of dealers without the dealers' knowledge and sometimes by bribery and requiring dealers to justify outside financing" (restrained by paragraph 6(l) of the Ford decree) "and further by using other means deemed necessary, appropriate and effective and that they have discriminated in various ways between General Motors dealers using General Motors Acceptance Corporation for financing purchases and sales of automobiles and those using outside finance companies in regard to delivery and financing of automobiles" (restrained by paragraph 6(f) of the Ford decree) "that they have given General Motors Acceptance Corporation quarters for its financial business" (restrained by paragraph 6(c) of the Ford decree) ", information concerning the sale and delivery of automobiles to dealers" (restrained by paragraph 6(d) of the Ford decree) "instruments necessary for its security in connection with financing and be-

fore delivery" (restrained by paragraph 6(b) of the Ford decree) "while refusing all of said things to outside finance companies and imposing onerous requirements upon them as to payment for automobiles"[1] (restrained by paragraph 6(a) of the Ford decree).

The remainder of the trial court's summary of the indictment was devoted to another charge relating to what is called the GMAC differential. The matters discussed in this part of the instructions were handled by an entirely separate paragraph of the Ford decree—paragraph 8 (R. 32) which is not involved here.

It is not without significance that in summarizing the indictment for the jury the trial court made no mention of the paragraph of the indictment which relates to advertising, endorsing, recommending and promoting GMAC. Paragraph 58 of the indictment (R. 148) did charge that General Motors advertised, endorsed, recommended and promoted the use of the automobile financing services, plans and facilities of General Motors Acceptance Corporation. The summary of the indictment given by the trial court follows the indictment quite closely until it comes to this paragraph. It then omits this paragraph and proceeds to take up the matters charged in the next succeeding paragraph. Were it not for the positive statements of the court with respect to recommendation, exposition, persuasion and argument, it might well be thought that this omission of the trial court was purely accidental. However, in view of these positive statements of the court, it seems unlikely that the omission was accidental. It seems clear from the instructions of the trial court taken as a whole that the court did not intend to hold that recommendation, exposition, persuasion and argument was conduct involving the use of force and therefore consti-

tuted a proper basis for the return of a general verdict of guilty.

It is, therefore, clear that each act and practice which the trial court held to involve the use of force, either expressly or by reference to the indictment, is restrained by paragraphs of the Ford decree that are not in question here. It is also clear that none of the acts specifically enjoined by paragraph 6(k) were held by the trial court to involve the use of force.

**VII. Complete suspension of paragraph 6(k) will not permit Ford to go beyond persuasion. If Ford went beyond persuasion, it would violate paragraphs of the decree not questioned here. Therefore, paragraph 6(k) should be completely suspended.**

There is no intermediate ground between threats and acts of persuasion. They are contiguous to and on opposite sides of the line drawn by the trial court between improper and proper conduct. The trial court recognized this in its description of exposition, persuasion, argument and coercion. It said of them: "They are different steps. They are graduated steps that I suppose every salesman goes through, except perhaps the last" (R. 100). After stating that the first three steps were proper, the court said: "He may not go beyond that and * * * coerce the person to accept that which he has to offer" (R. 100). In other words, he may not go beyond those three steps and threaten, or, in the language of the trial court, "use something that is within his power to use as a club to coerce the person to accept that which he has to offer" (R. 100).

It is difficult to see how, if 6(k) be suspended, Ford could go beyond recommendation, exposition, persuasion

and argument without running afoul of the restraints in paragraphs 6(f) and 6(h) which respectively enjoin Ford from threatening to discriminate between dealers and threatening to cancel a dealer's franchise. If Ford's conduct amounted to such a threat, it would violate one of those paragraphs.

Since all the acts which the trial court held to involve the use of force and therefore to constitute a proper basis for the return of a verdict of guilty are restrained by paragraphs of the decree not questioned here and since complete suspension of paragraph 6(k) would not permit Ford to go beyond persuasion without violating such other paragraphs of the decree, there is no reason why paragraph 6(k) should not be suspended completely.

**VIII. The trial court did not hold that the conduct restrained by paragraph 6(i) involved the use of force and constituted a proper basis for the return of a verdict of guilty. It made no mention of such conduct.**

6(i) restrains Ford from arranging with a finance company that representatives of both of them together visit a dealer for the purpose of influencing him to patronize that finance company. This is a special case of 6(k) which restrains advertising, recommending and endorsing: obviously when a Ford representative visits a dealer and brings along a finance company representative Ford is endorsing the finance company. Instead of passing compliments on the finance company behind its back Ford passes the compliments in its presence.

Nowhere in the indictment or in the instructions of the trial court can there be found any language charging or holding that this conduct is unlawful. The trial court did

not mention joint visits much less say in so many words that joint visits were illegal.

The lower court's finding that joint visits were held unlawful by the trial court in the General Motors case must have been based on its belief that joint visits belong on the illegal side of the line that the General Motors trial court drew between proper and improper conduct. The court must have believed that a joint visit fell within the general language that the trial court used when it said that General Motors could not use force. In other words, since the General Motors trial court had not held that joint visits as such were improper as a matter of law, the lower court must have believed that they were coercive as a matter of fact. The lower court was not justified in doing this. That brings us to the next point in the argument.

**IX. Since the General Motors trial court did not instruct the jury as a matter of law that the conduct restrained by 6(i) was improper, the lower court in this case was not justified in refusing to suspend 6(i) in the belief that the conduct restrained by that paragraph was coercive as a matter of fact.**

In the first place, joint visits are not inherently coercive and the trial court was not justified in believing, if it did so, that they were coercive. Whether a joint visit could be coervice depends on the language used and on other circumstances. If at the joint visit, the language used went beyond mere persuasion, then the conduct would amount to something more than a joint visit and would fall within the restraints in the Ford decree that are not questioned here. On the other hand, it is conceivable that the joint visit might be arranged under such circumstances that a threat of cancellation of the dealer's franchise was clearly implied. But then, it is not the joint visit that is coercive; the coercive conduct is the

combination of all the acts and circumstances implying the threat. It seems that those who drafted the Ford decree must themselves have realized joint visits are not inherently coercive. Otherwise there would have been no need for the restraint. Coercive conduct is adequately restrained in other provisions of the decree.

The government will probably state flatly—as it did in the lower court—that all joint visits are coercive regardless of the circumstances and however reasonable the language used.

But it was not intended under paragraph 12a of the Ford decree that an issue of this kind would be settled on the basis of the opposing statements of counsel. Nor was it intended that the issue would be settled by the taking of testimony in this case.

Under paragraph 12a of the Ford decree the issue of illegality was to be settled on the basis of a determination of a court in a General Motors case. It was to be determined upon the basis of what the court in a General Motors case held to be unlawful.

The government will probably argue—as it did in the lower court—that this issue was determined in the General Motors criminal case. It will refer to the evidence that was introduced in the General Motors case and say that that evidence proved that joint visits were coercive. However, under paragraph 12a of the Ford decree the evidence in the General Motors case was not to be determinative. Nor was the conclusion of the jury to be determinative if a general verdict were returned. The reason for this is apparent. Had paragraph 12a of the Ford decree made the evidence or the general verdict determinative, Ford would then have been legitimately involved in the same kind of argument with the government that it was improperly involved

in before the lower court. Ford would say that the evidence in the General Motors case showed that the joint visits there were made to weak dealers whose franchises were about to be cancelled or terminated under circumstances that implied that their franchises would be cancelled or terminated if they did not patronize GMAC. Ford would say that the evidence on the issue was weak and that the jury could not have relied on it in returning its verdict. The government would take the other position and say that its evidence was strong and that the jury must have relied on it. These arguments accomplish nothing. It is believed that it was for the purpose of avoiding such arguments that paragraph 12a was drafted as it was. The test was not to be the evidence introduced or what the jury believed but was rather to be what the trial court held to constitute a proper basis for a verdict.

Since the trial court did not hold that a joint visit necessarily involved the use of force and therefore constituted a proper basis for a verdict of guilty, the court in this case was not justified in basing its order on a belief that a joint visit did involve the use of force.

The purpose of paragraph 12a was to provide that Ford would be subject to the same restraints as General Motors. It said in effect that the statements of unlawfulness in the instructions of the trial court in the General Motors criminal case would be the equivalent of a restraint against General Motors enjoining the acts held unlawful. This purpose of the decree will be carried out if 6(i) is suspended. Ford will be subject to the same general restraints to which General Motors is subject. If Ford is cited for contempt on the ground that it made joint visits under circumstances that amounted to coercion the court will have to decide the same questions of fact that the jury in the General Motors case had to decide under the instructions

of the trial court. It will have to decide what Ford did and whether its conduct amounted to coercion. Suspension of 6(i) will give Ford equality under the law with General Motors and that is what was intended by paragraph 12a of the Ford decree. Therefore, paragraph 6(i) should be completely suspended.

### X. The difficulties of proof that might be imposed on the government by suspension of 6(i) and 6(k) do not justify denial of the suspension.

The government may maintain—as it did in the court below—that the difference between a threat and persuasion may involve such subtleties of language and conduct that it is impossible to tell where one begins and the other ends. This argument admits that the trial court drew a line between the two types of conduct, but criticizes the line drawn on the ground that the government's enforcement problem becomes difficult.

The difficulty of proof where the conduct is not clearly on one side or the other of the line drawn by the trial court is inherent in the nature of that line. The law is full of such lines. The difficulties involved in applying them in particular cases are generally not reason for abolishing them completely.

Sometimes equity will use its power in framing a decree under the anti-trust laws "to eradicate the evils of a condemned scheme by prohibition of the use of admittedly valid parts of an invalid whole." *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 724. But that power will not always be used. As stated by the court in the Bausch & Lomb case at page 729: "The path is narrow between the permissible selection of customers under the decision in Colgate & Co. and unlawful arrangements as to prices under this decree, but we think Soft-Lite is en-

titled to traverse it, after a reasonable interim to dissipate unlawful advantages, with such aid as Congress has given by the Miller-Tydings Act." Certainly there has been a reasonable interim in the Ford case, the injunction having stood undisturbed for over eight years.

This is not a case for application of that power. If the conduct held by the trial court in the General Motors case to be lawful is to be restrained, paragraph 12a of the Ford decree provided that such restraints should first be imposed upon General Motors by an equity decree. If imposed on General Motors, such restraints would become applicable to Ford through termination of the suspension. The application of the above doctrine in this case, which involves only the construction of a consent decree, would subject Ford to restrictions, contrary to the letter and intent of the decree, that had not been imposed on General Motors, the largest manufacturer in the automobile field. The resulting disturbance of equality of competitive conditions between them is not in the public interest.

**XI. The government itself has said that there is nothing illegal about advertising a finance company and that this restraint has not been imposed on General Motors.**

At the time of the entry of the consent decree, counsel for the government said:

> "It is the Department's idea, the one with respect to advertising, the other with respect to adoption of a Code of Fair Competition, that this public benefit goes far beyond anything that we could hope to accomplish in a litigated case, besides eliminating the discriminatory practices and coercion complained of by the independents in this suit" (R. 82).

The same counsel said at the hearing in the court below:

> "Now, as to the practice enjoined in paragraph (k), admittedly there is no injunction now outstanding against General Motors, either by way of the judge's charge to the jury or otherwise, which prohibits General Motors from advertising its affiliated finance company, GMAC. However, we submit that the other sections in paragraph (k), that a manufacturer shall not recommend or endorse the financing services of any particular finance company is effectively enjoined by the judge's instructions to the jury in the General Motors case," * * * (R. 176).

It is submitted that if the restraint against advertising has not been imposed upon General Motors by the judge's charge to the jury, neither have the other restraints contained in paragraphs (k) and (i) of the Ford decree. While the judge expressly said that recommendation was proper, he did not mention advertising or joint visits. There seems no justification for holding improper that which was expressly held to be proper and holding proper that which was not mentioned. The truth is that the trial court in the General Motors case did not hold that any of the acts restrained by 6(i) and 6(k) constituted a proper basis for the return of a verdict of guilty.

**XII. The finding of the District Court (Finding of Fact No. 10) (R. 159) that Ford was not laboring under any competitive disadvantage with General Motors in the manufacture and sale of Ford cars by virtue of the restraints contained in paragraphs 6(i) and 6(k) of the decree and that Ford offered no evidence showing competitive disadvantage is immaterial, even if it be true (which is denied).**

This finding of fact is supported by no conclusion of law that Ford must show evidence of competitive disadvantage to be entitled to relief under paragraph 12a.

But, had there been such a conclusion of law, it would have been erroneous and Ford would have assigned it as error. A consideration of the decree as a whole shows that 12a was designed to give Ford equality with General Motors under the law with respect to the type of conduct restrained by 6(i) and 6(k) and not to rescue Ford from time to time, as the occasions arose, from the effect of things that General Motors might do.

If Ford is denied this relief, 6(i) and 6(k) can never be suspended under 12a. 12a for all practical purposes becomes useless. Even if General Motors today were not engaging in the type of activities restrained by 6(i) and 6(k), it could start these activities at any time in the future and Ford, if 6(i) and 6(k) had not been suspended, would be helpless under 12a.

The fact that showings of various types were required under other provisions of the decree before Ford would be entitled to the relief provided for in those provisions indicates that the absence of such requirement in connection with the suspension of 6(i) and 6(k) was intentional. A study of the decree as a whole shows that it was very carefully drawn. A comparison of the requirements in the

various relief clauses shows that the differences in those requirements were deliberate.

For example, paragraph 15 of the decree (R. 39) deals with the competitive situation between Ford and automobile manufacturers other than Chrysler and General Motors. It provides that in certain cases (where another manufacturer in any year sells more than one fourth as many cars as Ford in any State) Ford may have certain restraints lifted. But in this paragraph it was provided that Ford would not be entitled to the relief unless it appeared to the court that the other manufacturer was engaged in activities restrained in the Ford decree and that these activities of the other manufacturer resulted or threatened to result in placing Ford at a competitive disadvantage in the sale of automobiles. Here a full showing of competitive disadvantage was expressly required.

Compare this paragraph with paragraph 12a(3)(ii). 12a(3)(ii) said that, before Ford would be entitled to suspension of paragraphs 6(a), 6(b), 6(c), or 6(g) of the decree because these restraints had not been imposed on General Motors, Ford would have to show to the satisfaction of the court that General Motors was performing the acts prohibited by these paragraphs (R. 37). That was the only requirement. 12a(3)(ii) did not go as far as 15 and state that Ford would also have to show that the performance of these acts by General Motors resulted or threatened to result in placing Ford at a competitive disadvantage with General Motors.

12a(3)(i), the paragraph under which Ford asks suspension of 6(i), 6(k), and part of 6(e), does not even require that Ford show what General Motors is doing.

Had the lower court concluded as a matter of law that Ford, in this case, was required to show that General

Motors was making joint visits to dealers with GMAC and was recommending, endorsing and advertising GMAC and that Ford was at a competitive disadvantage with General Motors as a result of these activities, the conclusion would have been contrary to the plain meaning of the decree and erroneous.

Ordinarily, this reasoning would seem conclusive. However, it may be considered that the opinion of this court in *Chrysler Corporation v. United States*, 316 U. S. 556, is authority to the contrary. It is true that the same line of reasoning was applicable in that case. The consent decree involved in that case was substantially the same as that involved here; but in that case it was only the bar against affiliation that Chrysler wanted terminated. As in the Ford decree, the bar was to terminate January 1, 1941 if it had not been imposed on General Motors. The termination was to be automatic. There was no express requirement that Chrysler show competitive disadvantage or that the government show due diligence in its attempt to impose that restraint on General Motors. There was presumably the same evidence in the decree that the omission of these requirements had been deliberate: presumably under paragraph 15 of the Chrysler decree, as in the same paragraph of the Ford decree, if Chrysler wanted a restraint terminated because of competition of some manufacturer other than Ford and General Motors, it was expressly required to show not only competitive disadvantage but also that the government was not proceeding diligently to impose a similar restraint on such competitor. Yet this court read similar requirements into the provision for termination of the bar against affiliation.

We will discuss this more fully in Part B of this Argument relating to the bar against affiliation in the Ford decree. We humbly believe that this court should not have

read these provisions into a portion of the decree when they seem to have been deliberately omitted. We feel that perhaps it was done because of the war time conditions mentioned in the opinion. However, even if the court should read the same provisions into Ford's relief clause relating to the bar against affiliation, we think that the reasons for doing so, as expressed in the Chrysler case, would not support the reading of unexpressed provisions into the relief clause relating to paragraphs 6(i) and 6(k). Of course, if the court concludes in this case that the 6(i) and 6(k) restraints have been imposed on General Motors by the conviction, then Ford's competitive disadvantage would not entitle it to relief. The argument based on the Chrysler case would be that, since 6(i) and 6(k) had not been imposed on General Motors, the court should postpone the relief asked by Ford to give the government a reasonable chance to impose these restraints on General Motors, unless Ford showed that in the meantime the restraints put it under a competitive disadvantage. That is what this court did in the Chrysler case: it postponed the termination of the bar against affiliation to give the government a reasonable chance to impose that bar on General Motors, unless Chrysler showed that in the meantime the bar placed it at a competitive disadvantage.

But, even if the postponement in the Chrysler case were correct, it is clear that it would not be proper here. The decree contemplated that these specific restraints would be imposed on General Motors by January 1, 1940. The government obtained the conviction of General Motors in November of 1939. It knew then what the trial court had said in its instructions. It knew that there had been no holding that the conduct restrained in paragraphs 6(i) and 6(k) was unlawful. Yet, for over seven years, the government has taken no action to impose those restraints on General Motors.

Furthermore, the decision in the Chrysler case was undoubtedly to save the government from the complete lapse of the bar against affiliation. The argument there was that it was the primary purpose of the bar against affiliation that Chrysler should be bound by the outcome of the General Motors case and that this purpose should not be defeated by the operation of a time limitation that was said to be of secondary importance. We will point out later that this involved reading into that clause an emphasis that was not there. But in paragraph 12a, it was expressly provided that Ford should be bound by the outcome of the General Motors litigation and, notwithstanding this, it was provided that the restraints not imposed on General Motors by January 1, 1940 should be suspended until they were imposed on General Motors. It is not necessary to postpone the suspension of 6(i) and 6(k) to enable the government to save these restraints by imposing them on General Motors. When they are imposed on General Motors, the suspension of the Ford restraints will terminate. To postpone the suspension of the restraints would be to disregard the express provision of the decree that they be suspended.

## XIII. The finding of the lower court that Ford was not under any competitive disadvantage with General Motors and had not made any showing of competitive disadvantage was wrong.

It is admitted by the government that General Motors Acceptance Corporation is a wholly owned subsidiary of General Motors. Ford contends that every visit made to a dealer by a representative of GMAC is the equivalent of a joint visit. The dealer knows that that representative speaks for General Motors as well as GMAC. Similarly every dealer knows that a General Motors representative speaks for GMAC. If a joint visit has any significance, it

is because of the implication that the finance company has manufacturer approval. It is clear to each General Motors dealer, without any joint visit, that General Motors wants him to patronize GMAC, that General Motors recommends GMAC. Even if GMAC were not a wholly owned subsidiary, but it were still known as the *General Motors* Acceptance Corporation recommendation would be inherent in the name alone.

Under these circumstances, it would seem idle to require proof that General Motors was making joint visits with GMAC and recommending GMAC.

Whether General Motors has actually gone beyond this and made joint visits and orally recommended GMAC, the record admittedly does not disclose. Ford felt that such a showing was not required by the decree and that, in view of General Motors control of GMAC and the use by GMAC of the General Motors name, such a showing should not be required by the court.

Furthermore, the record admittedly does not show the loss by Ford to General Motors of any particular sales as a result of Ford's inability to make joint visits with and recommend a finance company. It would be impossible as a practical matter to make any satisfactory showing of this. It would require an extensive investigation among the purchasers of General Motors cars to determine the reason why they did not buy Ford cars.

This would require personal interviews with large numbers of General Motors customers and those who said that they purchased General Motors cars because the GMAC financing plan was more attractive would have to testify to that effect. Ford is very reluctant to make such inquiry among General Motors customers. It feels that publicity of this kind would not be helpful to its own sales.

It also knows that people are loathe to answer personal questions like this, particularly where they may be called upon to testify. Furthermore, any inquiry into the motives that actuate the buying public is not apt to lead to reliable information.

Inquiry among Ford's own dealers would ordinarily be one way of ascertaining the extent of Ford's competitive disadvantage. But Ford does not feel that it can safely conduct such an inquiry. Paragraph 6(l) of the Ford decree (R. 31) restrains it from requiring disclosure of any information from its dealers for the purpose of influencing them to patronize a finance company. Under paragraph 10 of the decree (R. 33), if Ford is charged with violating paragraph 6(l), the burden is upon Ford to prove that the acts complained of were not done for the forbidden purpose. One of the purposes of this decree, and of the General Motors criminal case, was to free dealers of manufacturer influence. In a sense, therefore, Ford's dealers are adversaries in this matter. Ford feels that it would be unwise to inquire among its dealers as to how much business they have lost to General Motors as a result of their patronage of certain finance companies.

Ford, however, has shown that the financing of cars does have a bearing on sales volume, that Ford's sales volume has declined since the entry of the decree and that Ford believes that such decline is due in part to the restraints in question here.

There is a close relationship between sales and financing. Smaller down payments and smaller monthly installments payable over a longer period of time put the car within the purchasing power of more of that class of people who purchase out of monthly income rather than out of savings. The financing charge becomes a part of the delivered price of the car and reduction of this charge

increases the market for cars. The delivered price, size of down payment and size of each monthly installment will often determine which make of car a purchaser will buy. If GMAC offers a plan not available to Ford purchasers, General Motors will capture some of Ford's sales (R. 119).

Furthermore, the practices of the finance company to whom the dealer sells his retail time sales paper will determine whether a customer will come back when he wants to buy another car. Some finance companies make high charges for extensions of maturity and insurance renewals and will repossess without adequate notice. These practices affect Ford's goodwill since the car was sold at a place licensed to display Ford's trademark. Where the customer selects his own finance company, none of these considerations apply. Ford is only concerned where the customer uses the financing service made available by the dealer. It wants to persuade each dealer to make the best financing service available (R. 85, 86).

Dealers often do not select finance companies on the basis of the service they offer the customer. Finance companies bid for dealer patronage by offering them a rebate, called the dealer's reserve. This is not passed on to the customer. See paragraph 18 of the complaint in this case (R. 10).

If Ford were free to recommend, endorse and advertise a finance company, and to make joint visits, finance companies would compete for Ford approval as well as dealer approval. It would give Ford some voice in the financing arrangements of its dealers and give Ford a limited but nevertheless valuable means of inducing finance companies to offer services to Ford customers comparable to those offered by GMAC to General Motors customers.

As one example of the difference between the finance rates of GMAC and other companies, Ford has shown

these rates in the Detroit area (R. 122B). The basic cost of financing a General Motors car selling for $1100.00 is $60.00 for a twelve month period and $80.50 for a fifteen month period. Through three other finance companies, the cost of financing a car selling for the same price is approximately $88.00 for twelve months and $118.00 for fifteen months. Competitive disadvantage with General Motors is bound to result from such differences.

Ford has also shown by affidavit how its sales have changed as compared with General Motors. In 1939, General Motors made 43.7% of all cars sold; in 1940, 47.6%; and in 1941, 47.3%. In 1939, Ford made 21.4% of all cars sold; in 1940, 18.9%; and in 1941, 18.8% (R. 124A).

Ford feels that this declining trend is in part at least due to these restraints in the consent decree (R. 87, 118).

## PART B—THE BAR AGAINST AFFILIATION

### I. The relief clause in paragraph 12 should be enforced the way it was written even if the government has been diligent in requiring General Motors to part with GMAC and even if Ford had not shown any actual competitive disadvantage as against General Motors.

If this were a case of first impression, it would seem that the relief clause relating to the bar against affiliation should have been given effect exactly as it was written.

The clause was obviously a compromise of the conflicting interests of Ford and the government. The government believed that it was a violation of the Sherman Law for an automobile manufacturer merely to own a finance company. It therefore insisted that the consent decree restrain Ford from acquiring an interest in such a company. Ford was not averse to such a restraint if its two principal competitors were similarly restrained.

Chrysler Corporation, one of these competitors, was also willing to consent to such a restraint; but General Motors, the other and largest competitor (selling as many cars as Ford and Chrysler together), was not.

It would therefore be necessary for the government to impose this restraint on General Motors by litigation. This would take time. No such litigation had been commenced and, once commenced, it was unknown how long it would take to complete it. In the meantime, General Motors would continue to own GMAC and enjoy all the advantages that such ownership might bring. Ford had owned a finance company until 1934 and in that year had sold it to others. Ford realized that because of the advantages of finance company ownership it might again want to acquire one and might have to if it were to compete on equal terms with General Motors. Therefore, it was unwilling to wait an indeterminate length of time for the government to force General Motors to dispose of GMAC.

The government, on the other hand, would have liked to have had Ford agree to wait until the General Motors litigation was completed, however long it might take.

Compromise of these conflicting interests was possible because Ford was willing to concede that the government was entitled to a reasonable length of time in which to impose this restraint on General Motors and because the government was willing to concede that Ford would suffer if it had to wait an unreasonable length of time.

The compromise was effected by agreeing on a date beyond which Ford would not have to wait—January 1, 1941. This gave the government over two years in which to require General Motors to part with GMAC; it provided Ford with an automatic escape within a reasonable and foreseeable period. Everyone was apparently satisfied.

Then, shortly before January 1, 1941, the government told Ford that it had not yet succeeded in making General Motors dispose of GMAC and asked Ford if it would consent to be bound for one more year. Ford consented.

This happened for five successive years. Of course, when the government made its request just before January 1, 1942, Ford was already heavily engaged in the manufacture of non-automotive products for national defense; the country was at war on two fronts; and negotiations were under way for an order terminating all non-military passenger car production. It looked as though it would be a long time before Ford needed a finance company. It therefore had no objection to the extension of the bar against affiliation to January 1, 1943. For the same reasons, it did not object to the next three extensions. But when the government came to it before the expiration date on January 1, 1946, the situation had changed. The war had been over for four months. Ford was reconverting to the manufacture of passenger cars with all possible speed. The government had had over seven years in which to force General Motors to part with GMAC and it was still doubtful when, if ever, that litigation would come to an end. Ford felt it necessary to arm itself with every possible weapon for use in competing with General Motors. In the three years between the entry of the consent decree and the beginning of the war, Ford had lost sales to General Motors. That trend had to be reversed. Accordingly, Ford refused to consent to any further extension of the bar against affiliation.

Nevertheless, the government moved for a further extension of one year and the lower court granted it. The theory of the government and the lower court was based on a disregard of the date contained in the decree as amended. They went behind the compromise upon which

the parties had agreed in the original decree and its subsequent modification; tried to ascertain what the conflicting interests were that led to that compromise; and then tried to judge the importance of those interests.

First, the government contended—and the lower court found—that the primary purpose of paragraph 12 of the Ford decree was that the ultimate rights of the parties should be determined by the General Motors case. The lower court made a finding of fact (No. 13) and also a conclusion of law (No. 4) to this effect (R. 160, 161). No evidence was introduced to establish this purpose as a fact. Both the finding of fact and the conclusion of law must have been based on an examination of the decree.

Second, the government contended—and the lower court found—that the time clause in paragraph 12 was subsidiary to this primary purpose; that it was inserted to protect Ford from competitive disadvantage with General Motors in the event the government unduly delayed its prosecution of the General Motors suit. The government says the time clause was inserted merely to make it hurry up in its prosecution of General Motors. The lower court here too made a finding of fact (No. 14) and a conclusion of law (No. 4) (R. 160, 161). There was no evidence tending to establish as a fact that this was what the negotiators of the decree intended by the language used. This finding and conclusion must also have been arrived at merely from an examination of the decree.

Having established these two points, the lower court then found that the government had been diligent in its prosecution of the General Motors suit (Finding of Fact No. 2) and that Ford was not under any competitive disadvantage with General Motors as a result of the bar against affiliation (R. 158, 160). Upon this basis, the lower court extended the bar for one more year.

Ford believes that the language of the decree does not sustain this interpretation and that therefore the relief clause should have been enforced the way it was written.

The purpose of paragraph 12 was not that the rights of the parties should be ultimately determined by the General Motors litigation. If this had been its purpose, there would have been some provision for adjusting Ford's rights to the actual holding of the court in the General Motors case. Ford does not know that that case will determine as a general principle in every case that it is unlawful for an automobile manufacturer to own a finance company. Ford does not know what that case will determine as a matter of law. The holding in that case may well be confined to facts that are applicable only to General Motors. If Ford's rights were under the decree to be determined by that litigation, there would have been a provision in the Ford decree for adjustment of the bar against affiliation so that it would be commensurate with the holding in the General Motors case. This was what the decree provided with regard to the special restraints in paragraphs 6 and 7. The relief clause regarding those restraints specifically provided that the General Motors litigation should govern and did not provide for the complete termination of the restraints if they were not imposed on General Motors by January 1, 1940. Instead, it said they would be merely suspended; and they were then only to be suspended to the extent that they had not been imposed on General Motors. The restraints in paragraphs 6 and 7 were to be adjusted from time to time so that they would never exceed the restraints against General Motors.

This was not true in the case of the bar against affiliation. There was no provision for adjustment of the Ford restraint to the General Motors restraint. There was no provision for suspension and reinstatement. There was

nothing to indicate expressly that the Ford rights were to be determined by the rights of General Motors on the question of affiliation. Indeed, had the government's suit against General Motors been started promptly and ended adversely to the government within a year after Ford's consent decree, there was no provision for terminating Ford's bar against affiliation prior to January 1, 1941.

The purpose of the relief clause in paragraph 12 was merely to provide Ford with an automatic termination of a restraint to which it had agreed, if General Motors were not required to part with GMAC within a stipulated period. If General Motors were not required to do so within that time, then Ford was to be returned to its rights and liabilities under the Anti-Trust Laws. If Ford acquired a finance company, the government could prosecute it if its conduct were unlawful under those laws. But Ford would in the meantime be placed in a position of equality with General Motors.

In order to put this intent into effect, the parties drafted a very clear and simple clause, stated to be an express condition of the decree and to be effective notwithstanding any other provisions of the decree. This clause provided that the bar against affiliation would lapse and that appellant would be entitled to an order that it had lapsed. It is difficult to see how the clause could have been worded any more clearly.

The lower court has taken a clause that was obviously intended for the primary purpose of providing relief to Ford and has held that its primary purpose was to have Ford's rights ultimately settled by the General Motors case, notwithstanding the complete absence of any language indicating that Ford's rights were to be adjusted to the holding in the General Motors case.

The way was then paved for the court to hold that Ford's rights under the clause were of secondary importance.

The result is that what was intended to be a clear cut time limit has been converted into a limit with vague standards. The government is given as much time as it wants to prosecute General Motors subject only to the vague standard of due diligence and Ford can obtain relief sooner only if it comes into court with a plan for the acquisition of a finance company and shows adoption of the plan is necessary to prevent hardship.

By the perversion of simple language, the court has succeeded in reading into this clause phrases which were not there. This might be justified where necessary to arrive at the true intent of the parties; but it hardly seems justifiable to supply phrases which appear to have been deliberately omitted.

It is quite clear that these phrases were deliberately omitted. Compare the relief clause in paragraph 12 and that contained in paragraph 15. They have striking similarities of purpose; paragraph 12 was to protect Ford from General Motors while paragraph 15 was to protect it from some manufacturer other than General Motors and Chrysler. They both provided for the ending of restraints which had not been imposed on the competitor.

Under paragraph 15, if the sales of some manufacturer other than Chrysler or General Motors should in any year amount to at least 25% of Ford's sales, if such manufacturer should do something Ford was restrained from doing, if this resulted or threatened to result in placing Ford at a competitive disadvantage as against such manufacturer, and if the government had not obtained or was not proceeding with due diligence to obtain an adjudication

of the illegality of such conduct, then Ford was entitled to an order rendering inoperative the restraint against such conduct. Ford has consented to be restrained from performing such conduct and this clause was for the purpose of giving Ford relief if the restraint subjected it to competitive disadvantage.

The purpose of paragraph 12 was exactly the same. Ford had consented to be restrained from acquiring a finance company, but it wanted relief if the restraint were not imposed on its competitor. Under paragraph 12, however, the extensive showing demanded by paragraph 15 was not required. The reason was apparent. General Motors was known to be selling many more cars each year than Ford. It was known that General Motors already owned GMAC and that this ownership would give General Motors a competitive advantage. And the parties were then in a position to decide what would be a reasonable time for the government to require General Motors to dispose of GMAC. Accordingly, there was no requirement for a showing of the volume of General Motors sales, for a showing that General Motors owned GMAC, for a showing that this ownership placed Ford at a competitive disadvantage, or for a showing that the government had not proceeded diligently to force General Motors to part with GMAC. Instead, paragraph 12 merely provided that the bar against affiliation would become inoperative if General Motors had not been required to dispose of GMAC by January 1, 1941.

For these reasons, we think that paragraph 12 of the Ford decree meant what it said and did not mean what paragraph 15 said. Therefore, we think it was error for the court to read into paragraph 12 some of the requirements expressed in paragraph 15; and it was certainly wrong for it to do so on the basis that the primary pur-

pose of paragraph 12 was to have Ford's rights established by the General Motors litigation, where paragraph 12 failed to contain provisions such as were contained in paragraph 12a for the periodic adjustment of Ford's restraints to those from time to time imposed on General Motors.

In short, we think that paragraph 12 should have been enforced the way it was written and that this type of order, and only this type, would have carried out the basic intent of the parties.

But, assume that the lower court was correct in going behind the compromise which the government and Ford wrote into the decree; assume that the basic purpose of paragraph 12 was to have Ford's rights ultimately determined by the General Motors case; was the lower court right in extending the time on the ground that the government had proceeded diligently in the General Motors suit? Certainly from Ford's point of view, any delay in the General Motors case would have been objectionable whether caused by the government, by General Motors, by the condition of the trial court's calendar, or any other reason. The compromise between the parties was worked out to give the government a reasonable time to obtain a decree against General Motors and to protect Ford from the effects of any unreasonable delay in the securing of that decree. Assuming for the moment that the lower court was correct in overlooking the time the parties agreed upon as reasonable, was the lower court justified in determining reasonableness exclusively from the government's point of view? Was it justified in saying that, since the inability of the government to bring its case to trial was not the government's fault, the government had not had a reasonable time in which to complete the case? Ford submits that the court should have de-

termined the reasonableness of the time from Ford's point of view. Ford's interest was as important a consideration leading to the compromise as the government's. To Ford, it made no difference whether the delay was due to the government or due to some other cause. Indeed, it was particularly anxious to avoid the effect of delays caused by General Motors. It knew that it was in General Motors' interest to delay that suit as much as possible. The government's explanation of the long, long delay in the General Motors case is that it has been harassed by General Motors. Ford can well picture the satisfaction with which General Motors views the predicament in which its policy of not coöperating with the government has placed one of its principal competitors who did coöperate with the government.

Viewed from Ford's point of view, it is clear beyond any doubt that the time has been unreasonable. Ford originally thought a little over two years was reasonable. It granted one extension of one year before the war. However, the next four extensions were not made because Ford thought that the government had not had enough time; they were made, instead, because Ford was so heavily engaged in the war effort. The government has now had over eight years, approximately four times as many as originally contemplated. By any standard of reasonableness, this is too long.

**II. Chrysler Corporation v. United States, 316 U. S. 556, is distinguishable on the ground that the complete abandonment of automobile production during the war produced a situation not within the contemplation of the parties at the time of the consent decree and justified the further extension of the bar against affiliation in that case.**

Although we respectfully contend that the Chrysler case should not have been decided as it was, we believe that perhaps the basis of that decision was the change in circumstances since the decree was entered. The court said (316 U. S. 564):

> "Moreover, we cannot be blind to the fact that the complete cessation of the manufacture of new automobiles and light trucks has drastically minimized the significance of the competitive factor."

It is true that this is the only language of the opinion from which it can be inferred that this was the basis of the decision. But, it seems to us that only some such exceptional circumstance could have justified the court in disregarding an express agreement of the parties as to what constituted a reasonable time, and in throwing upon Chrysler the burden of proving actual competitive disadvantage when it was clear that the decree did not require any such proof.

Such circumstance no longer exists. Ford reconverted to the manufacture of automobiles and now needs to have the relief clause enforced.*

*See the order of August 30, 1945 of the War Production Board. F.R. Doc. 45-16273, 10 F. R. 11198.

**III. The government has not been diligent in requiring General Motors to part with GMAC and made no showing of such diligence.**

The inquiry as to whether the government has been diligent should start with the opinion of the court in *Chrysler Corporation v. United States*, 316 U. S. 556.

Although the court refused to disturb the finding of the lower court in that case to the effect that the government had proceeded diligently and expeditiously against General Motors, the court made this comment (316 U. S. 563):

> "There is room for argument that this statement is markedly generous to the government; inasmuch as the civil suit against General Motors was not instituted until almost two years after the entry of the consent decree and only three months prior to the limiting date in paragraph 12."

If there were room for argument in that case that the government had not proceeded diligently, it would seem that there is no room for argument in this case that the government has proceeded diligently. Almost five years have passed since the decision of that case. What was in that case an extension of the original period from two to four years has now become an extension to eight years, four times the original period and twice the length of the extended time in the Chrysler case.

To justify this additional time, the government relied entirely on affidavits (R. 66-72). As appears from the Chrysler case (316 U. S. 561), in that case "The government offered in evidence a transcript of the proceedings in the civil suit against General Motors." Here no such transcript was offered.

The last occurrence in the General Motors case that was before this court in the Chrysler case was an order of the

District Court setting January 15, 1942 as the date by which General Motors would be required to answer. In view of this situation, this court extended the date for the lapse of the bar against affiliation to January 1, 1943.

In none of the motions to extend the date for lapsing in the Ford case, except the motion now before the court, did the government attempt to show any reason for the delay in the General Motors case. Such showing was not necessary because Ford agreed to the extension in each case.

However, on the last motion of the government for extension to January 1, 1947—the motion now before the court—some showing to support the claim of due diligence was required.

The only showing made was with respect to the period subsequent to December 31, 1944. The lower court and Ford were left completely in the dark as to what transpired between January 15, 1942—the date when General Motors was required to answer—and December 31, 1944, a period just fifteen days short of three years. Certainly, a finding of due diligence cannot be supported without any knowledge of what went on during all these years.

By consenting to extensions during that period, Ford was not consenting to what the government had done in the General Motors case. Ford was neither admitting that the government had been diligent nor waiving any future right it might have to claim that the government had not been diligent. Those consents were not predicated on any exchange of information between the parties. Each one was predicated only on the fact that, at the time the government made each request, Ford was not interested in opposing the request. It was busy with production for the war and was not making automobiles for the public.

After passing over this period of three years without a comment, the government in its affidavit said that since December 31, 1944 it had been diligent. It supports this statement by saying that, between that date and July 9, 1945, it was busy taking 220 depositions and that General Motors planned to take 200 additional depositions. To stop the taking of these additional depositions, the government on July 9, 1945 filed a motion which was heard on July 17 and 18, 1945. At the time of the government's motion in this case to extend the date for the lapse of the bar against affiliation (the date of the affidavit is December 29, 1945), the court in the General Motors case had not decided this motion relating to the depositions. During this five months period, the government could have taken most of the additional 200 depositions. If it could take 220 depositions between December 31, 1944 and July 9, 1945, a period of a little over six months, it could have gone a long way toward taking the remaining 200 depositions in five months. But, what does the affidavit say about this? Merely:

> • • • "but the plaintiff and General Motors Corporation have endeavored by agreement to expedite and limit the taking of depositions in said case in the interest of bringing the General Motors case to trial at the earliest possible date" (R. 70).

That is all the court below had to rely on in finding that the government had proceeded diligently and expeditiously in its said suit (R. 158).

By the time this motion was argued in the court below, June 10, 1946, almost six months later, the General Motors case had still not been reached for trial.

It is submitted that the finding of the lower court was not supported by any evidence, and that on the basis of the showing made by the government, the lower court should have found that the government had not proceeded diligently and expeditiously in the General Motors case.

The government's lack of diligence should be sufficient ground for the denial of the government's motion to postpone the lapse of the bar against affiliation. If the primary purpose of paragraph 12 was to give the government a reasonable time within which to complete its General Motors litigation, then that purpose has been accomplished. The government has had a reasonable time. If the purpose of the time limit in paragraph 12 was to serve as an incentive to the government to expedite its General Motors litigation, then the time limit has failed to serve that purpose. Further extension of the date for lapse notwithstanding the government's lack of diligence would go beyond the holding in the Chrysler case and establish the principle that the diligence of the government was not an important factor in determining whether the date for lapse should be extended.

It is submitted that this part of the lower court's order should be reversed on this ground alone.

### IV. Ford is under a competitive disadvantage with General Motors as a result of the bar against affiliation and established this fact in the court below.

The remarks made in this brief (Paragraph XIII of Part A of the Argument) relating to Ford's showing of competitive disadvantage in connection with the restraints in paragraphs 6(i) and 6(k) apply with equal force here, except that here we are concerned not with Ford's ability to influence other finance companies to furnish a financing service comparable with that furnished by GMAC, but rather with Ford's ability to provide by itself a competitive financing service. If Ford had a finance company, it could reduce its rates to those charged by General Motors, as, for example, in the Detroit area (R. 122B). If Ford had owned a finance company in 1940 and 1941, it probably

would not have lost the sales referred to in one of the affidavits accompanying its motion (R. 121).

As stated in Paragraph XIII of Part A of this Argument, it is as a practical matter, impossible for Ford to prove the specific loss of sales to General Motors as a result of these restraints. The best evidence of such loss would be the testimony of purchasers of General Motors cars. Ford is very reluctant to attempt to secure such testimony. Perhaps, the next best evidence would be the testimony of Ford's own dealers. But, for evidence of this kind, Ford has had to rely on information that happened to come to the attention of its own employees. As pointed out in Paragraph XIII of Part A of this Argument, Ford has felt that it could not safely go to its dealers for this information. It must be remembered that the primary purpose of this decree, as of the General Motors criminal case, was to free the dealers of the influence of the manufacturer. The dealers are, therefore, in a sense Ford's adversaries in this litigation. This avenue for producing evidence of actual competitive disadvantage is in effect closed to Ford.

Ford submits that its showing of competitive disadvantage is all that should be required of it. Ford contends that it is sufficient, and that the lower court was in error in finding that Ford was not under a competitive disadvantage and had not shown any.

With respect to the requirement of the court below that Ford submit to the court a plan for the acquisition of a finance company, it is submitted that this imposes upon Ford an unnecessary hardship as a condition precedent to the obtaining of the relief promised it in paragraph 12. Aside from the danger that the negotiation and adoption of such a plan might place Ford in contempt of court under paragraph 12, it is not practical for Ford to negotiate for

the purchase of stock in a finance company without knowing in advance that it can complete its purchase as soon as the negotiations have resulted in an agreement. No owner of stock in a finance company would enter into such an agreement contingent upon final approval of a court which it might take several months to obtain, particularly if an appeal was involved as it is in this case. Furthermore, Ford could not enter into such an agreement contingent upon approval of the court without violating the consent decree. Therefore, Ford in submitting the plan to the court would be in the position of submitting a plan which it did not know it could put in effect. Furthermore, if Ford decided not to purchase stock in some existing finance company but decided to organize a finance company of its own, this decision would depend upon economic facts which might change between the date the plan was submitted to the court and the date when it was finally approved. Ford should not be put to the burden of arranging the details of such a plan so far in advance of the time when it would know that it could put the plan into effect.

Ford is actually under a competitive disadvantage merely because it is restrained from owning a finance company. The finance companies who do the financing of Ford cars know that as long as that restraint continues Ford can do nothing to compete with them. The termination of the restraint, even if Ford never acquired a finance company, would put it within Ford's power to threaten to go into the financing business if existing finance companies did not give the kind of service which Ford deems essential to obtain a maximum sales volume.

Therefore, Ford submits that it should not be required to offer a plan for acquiring a finance company as a condition precedent to obtaining the relief promised it in paragraph 12.

## VII.

## CONCLUSION

It is respectfully submitted that the order of the court below should be reversed and the case remanded with appropriate directions to:

1. Grant appellant's motion for the suspension of paragraps 6(i), 6(k) and 7(d) of the consent decree and for the suspension of such portion of paragraph 6(e) of said decree as is necessary to permit appellant to recommend, endorse or advertise any plan or finance company to any dealer or to the public either in the presence of or without the presence of a representative of such finance company, such suspension to continue until substantially identical restraints have been imposed upon General Motors Corporation either (x) by consent decree, or (y) by final decree of a court of competent jurisdiction not subject to further review, or (z) by decree of such court, which, although subject to further review, continues effective;

2. Deny the motion of the government for substitution of the date January 1, 1947 in lieu of the date January 1, 1946 in paragraph 12 of said decree;

3. Grant the motion of appellant for the entry of an order that nothing in the consent decree shall preclude appellant from acquiring and retaining ownership of and/or control over or interest in any finance company, or from dealing with such finance company and with said appellant's dealers in the manner provided in said decree or in any order of modifica-

tion or suspension thereof entered pursuant to paragraph 12a thereof.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1947 1948

~~No. 644.~~ 2

COMMERCIAL INVESTMENT TRUST CORPORATION,
COMMERCIAL INVESTMENT TRUST, INC.,
UNIVERSAL CREDIT CORPORATION, *et al.*,
*Appellants,*

*v.*

THE UNITED STATES OF AMERICA.

## BRIEF FOR APPELLANTS.

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